



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 719 OF 2013**

*(Before D. K. N. Marete)*

**PETER ONTERE NYAMIRA.....CLAIMANT**

**VERSUS**

**MUTHURWA GIRLS SECONDARY SCHOOL.....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide a Statement of Claim dated 16th May, 2013. The issue in dispute is therein cited as;

*Wrongful and unfair termination of employment services of Peter Ontere Nyamira;*

The respondent in a Respondent's Amended Reply to Statement of Claim amended on 15th July, 2016 denies the claim and prays that it be dismissed with costs.

The claimant's case is that he was gainfully employed by the respondent as a teacher on 2nd May, 2010.

The claimant's further case is that he served with diligence and attended his assigned duties promptly with diligence and loyalty.

The claimant's other case is that on 28th September, 2011 the respondent, without any lawful or justifiable reason dismissed the claimant without paying his terminal dues. This was a verbal/oral termination in which the headmistress told him to keep off the school premises and instructed the guards not to let him in.

The claimant's further case is that his advocates made a demand letter to the respondent appealing for reinstatement and or payment of terminal dues but this fell on deaf ears. The only recourse by the respondent is an invitation to the claimant to attend a board meeting two years down the line.

The claimant pleads loss as a consequence of the illegal and unfair termination as follows;

<i>a) One month's salary in lieu of notice</i>	<i>Kshs.15,000</i>
<i>b) Salary for September 2011</i>	<i>Kshs.15,000</i>
<i>c) Leave days (48 days x 1/30 x 15,000)</i>	<i>Kshs.24,000</i>
<i>d) 12 months salary for unfair termination</i>	<i>Kshs.180,000</i>
<b>Total</b>	<b><i>Kshs.234,000</i></b>

*And the Plaintiff claims damages*

The claimant's seeks to buttress his case by faulting the respondent's action on the following grounds;

- The Claimant at all times did carry out her duties with loyalty and diligence,*
- The Respondent did not follow the required procedures to ensure fairness as stipulated by the rules of Natural Justice.*

c) Failed to prove any allegations leveled against the Claimant as required under Section 43 (1) of the Employment Act 2007.

d) The Respondent has treated the Claimant with contempt, haughtiness and high in a discriminatory manner.

He prays as follows;

a) A declaration and finding that the claimant's employment was unfairly terminated and that the said termination of employment is null and void for all intents and purposes.

b) An order directing the Respondent to reinstate the Claimant to his employment without loss of position, status or benefits.

c) An order directing the Respondent to pay the Claimant all his outstanding dues as pleaded in paragraph "9" above.

d) Costs and interest at court rates from the date of filing this claim until payment in full.

e) Any other further or better relief that his honourable court may deem fit.

The respondent's case is a denial of the claim.

It is her case that the claimant was not a diligent and loyal employee but instead avers that the claimant deserted duty without notice, his last day at work being 27th September, 2011. He was hitherto habitually late in reporting to work.

The respondent's further case is that the claimant deserted duty and attempts to have him report back to work were either ignored or neglected. A letter was sent to him after desertion of duty on 30th September, 2011. He was subsequently issued with summons to attend the school Board of Governors on 21st April, 2012 vide a letter dated 10th April, 2012. At this meeting the claimant services were terminated and he was informed of the outcome in writing.

It is the respondent's case that the claimant did not respond to all her letters during the initial disciplinary proceedings but issued a demand letter a year later, sometimes on 2nd April, 2013. This is despite numerous written interventions by the respondent inviting the claimant to avail himself for a discussion of the issues in dispute to which he never responded.

In the penultimate, the respondent's case comes out as follows;

*12(a) The Respondent specifically avers that the claimant has approached this Honourable court with unclean hands tainted with desertion of his obligations as a teacher in the school, especially when the claimant was teaching a unit in the form four class who were having their Kenya Certificate of Secondary Education Exams.*

The matter came to court variously until the 17th April, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 3rd May, 2018 seeks to rely on section 41(1) of the Employment Act, 2007 which provides as follows;

*41. (1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

In a further submission of a case of unlawful termination of employment, the claimant seeks to rely on section 45(1), (2), (4) and (5) of the Employment Act, 2007 as follows;

*45.(1) No employee shall terminate the employment of an employee unfairly.*

*(2) A termination of employment by an employer is unfair if the employer fails to prove-*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason-*

- (i) related to the employees conduct, capacity or compatibility; or
  - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.
- (3) ...
- (4) A termination of employment shall be unfair for the purposes of this Part where-
- (a) the termination is for one of the reasons specified in section 46; or
  - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
  - (b) the conduct and capability of the employee up to the date of termination;
  - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
  - (e) the existence of any previous warning letters issued to the employee.

He further seeks to rely on section 49(1) of the Employment Act, 2007 as follows;

49.(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay the employee any or all of the following –

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
- (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
- (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The claimant further seeks to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** which emphasizes the requirements of substantive and procedural fairness in cases of termination and employment as follows;

*“for termination of employment to pass the fairness test, there must be both substantive and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in affecting the termination.”*

The claimant in the penultimate submits a case of plea and proof of general and special damages as per section 47(5) of the Employment Act, 2007 which provides as follows;

47 (5) *“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”*

The respondent in her written submissions dated 9th May, 2018 also relies on section 45 (5) of the Employment Act, 2007 in stating a case of lawful termination. It is her case that the claimant was terminated from employment for gross misconduct by way of absconding duty.

The respondent further seeks to rely on the provisions of sections 43 (1) and 45 (2) (supra) of the Employment Act, 2007 in establishing that the termination of the employment of the claimant was justified and for fair reasons. These provides as follows;

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45

The respondent further seeks to rely on the authority of sections 8 and 9 of the Public Ethics Act, Part III which provide the general code of conduct and ethics at the work place as follows;

8. A public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly.

9. (1) A public officer shall-

(a) carry out his duties in a way that maintains public confidence in the integrity of his office;

(b) treat the public and his fellow public officers with courtesy and respect;

(c) to the extent appropriate to his office, seek to improve the standards of performance and level of professionalism in his organization;

(d) if a member of a professional body, observe the ethical and professional requirements of that body;

(e) observe official working hours and not be absent without prior authorization or reasonable cause;

(f) maintain an appropriate standard of dress and personal hygiene; and

(g) discharge any professional responsibilities in a professional manner.

It is the respondent's case that the termination of employment of the claimant was a consequence of misconduct on his part. He was awarded all opportunity to be heard but squandered the same through lack of response to summons for any meaningful deliberations on the issues in dispute or even disciplinary process. He has himself to blame.

The claimant's case is a bluff. It lacks seriousness in all senses of the word. It is hollow through and through. The claimant outlines the prerequisites of a case of lawful termination of employment and seeks to apply these on himself and his case. Unfortunately, these do not fit in and are wholly misplaced. Why? The claimant is wholly silent on the succinct and candid defence of chronic absenteeism where he leaves and remains mum only to resurface with a demand note and this claim.

The claimant submits compliance with section 47 (5) of the Employment Act, 2007 in proving his case of unlawful termination of employment. Nothing can be further from the truth. This is a desolate attempt by the claimant to plant a case of unlawful termination of employment. The eloquent and resounding case of the respondent is not in any way rebutted or controverted. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

**Dated and signed this 19th day of July, 2018.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 25<sup>th</sup> day of July, 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Miss Chege holding brief Mr. Enonda & Associates for the claimant.
2. Mr. Chesina Instructed by State Law Office for the respondent.